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ABSTRACTS OF RECENT AMERICAN DECISIONS.

COURT OF CHANCERY OF NEW JERSEY.¹SUPREME COURT OF NEW YORK.²

AGENT.

Purchase of Property of Principal—Trust—Parol Agreement to buy in Trust for Another.—An agent attending a sale for his principal has no right to buy the property at that sale for himself or any one else than his principal, at a price less than would secure his principal's claim. He would be held a trustee for his principal, and any written or properly declared trust for any other, would be held subject to the first trust for the principal: *Walker v. Hill*, 6 C. E. Green.

If a plaintiff in execution makes an agreement with the defendant that he will buy the property at sheriff's sale and hold it for his benefit, and takes advantage of such agreement to buy in the property at prices lower than he otherwise could have done, he will be taken to hold in trust for the defendant, who will be allowed to redeem. But a court of equity will not enforce such an agreement, being merely in parol, unless the fraud or *mala fides* be clearly and fully shown.

The mere non-performance of a beneficial parol agreement is not a fraud which will induce a court of equity to compel performance.

It is the settled doctrine that if the answer admits a contract, without stating that it was not in writing and setting up the Statute of Frauds, the statute cannot be used as a defence. The admission will be held to be of a written contract, and no proof need be offered of it. But if the pleading or answer denies the existence of any agreement, the plaintiff must prove a written agreement.

BOND.

Non-payment at stipulated time.—When the condition of the bond provides that upon failure to pay the interest within a definite time after it becomes due, the principal shall become due, mere inattention or forgetfulness as to the place or person to whom it is to be paid will not excuse the non-payment, and the contract will be enforced: *Spring v. Fisk*, 6 C. E. Green.

COVENANT. See *Mortgage*.

CRIMINAL LAW.

Evidence as to Character.—Whenever a prisoner on trial puts his general character in issue, by his own act, he takes the risk of its being proved bad, and of every presumption which such proof legitimately raises against him: *Burdick v. The People*, 58 Barb.

And so, where a prisoner, upon trial on an indictment for a felony, avails himself of the privilege granted by the statute of 1869, of testifying as a witness in his own favor, he necessarily puts his general char-

¹ From C. E. Green, Esq.; to appear in vol. 6 of his reports.

² From Hon. O. L. Barbour; to appear in vol. 58 of his reports.

acter and credibility as a witness in issue, and makes it the proper subject of evidence on that question: *Id.*

When he makes himself a witness he becomes subject to all the rules applicable to other witnesses, notwithstanding his other character of a party on trial for a felony: *Id.*

The statute which allows a prisoner, upon trial for a crime, to become a witness in his own behalf, at his own election, does not protect him from being impeached, the same as any other witness: *Id.*

Judge's Charge; Questions of Law or Fact.—Where, upon a trial for murder, the question raised by the prisoner's testimony was, whether, situated as he was, there was reasonable ground for an apprehension, on his part, of a design on the part of the deceased to do him, the prisoner, some great personal injury, and to believe there was imminent danger of such design being accomplished; and the judge charged, as matter of law, that the homicide was not justifiable, even if the jury believed the facts and circumstances, at the time and before the firing of the pistol which produced it, were as stated by the prisoner in his testimony: *Held*, that the question was clearly a question of fact; and that the charge was erroneous because it took the question from the jury entirely: *Id.*

DAMAGES.

Evidence.—Where, in an action to recover damages for the detention of water from the plaintiff's factory, the plaintiffs were allowed to prove how many yards less of cloth they made, in consequence of such detention than they could have made had the water not been detained as it was, and what the profit on each yard manufactured and sold was at the price at which they sold what they did make: *Held*, that this was clearly incompetent for the purpose of ascertaining the amount of damages sustained by the plaintiffs, it being wholly speculative and conjectural: *Pollitt et al. v. Long*, 58 Barb.

Measure of.—The true measure of damages, in such a case, is the value of the use of the water to the plaintiffs, situated as they were during the time they were wrongfully deprived of it: *Id.*

DEED.

Covenant of Warranty.—The general covenant to warrant and defend premises conveyed against all lawful claims, includes the covenant for quiet enjoyment, and the true meaning of it is that the grantee and his heirs and assigns shall not be deprived of possession by force of a paramount title. It runs with the land, and passes with the fee to any subsequent grantee of the same title: *Rindskopf v. The Farmers' Loan and Trust Co.*, 58 Barb.

Such a covenant, it is well settled in this state, is only broken by an actual eviction from the premises. Where there has never been any possession under or through the deed containing the covenant, there can be no actual eviction: *Id.*

Recovery for breach of Warranty.—Where, at the date of a deed, the premises granted are in the possession of persons claiming adversely to the grantee and his grantor; and such persons and others claiming under them, are permitted by the grantee and those deriving title from

or through him to remain undisturbed until their adverse possession ripens into a good title, as against the grantee, the latter, or one claiming under him, cannot be allowed to recover upon the covenant of warranty for a failure of title by such means; they not having lost their land by a title paramount, existing at the time of executing the covenant, but by their own laches, in suffering an imperfect and inferior claim of title to become a legal title paramount to theirs. *Id.*

FRAUDS, STATUTE OF. See *Agent*.

INFANT.

Sale of Infant's Land—Evidence—Reversionary Estate.—Upon a reference to examine and report whether the interest of infants requires and will be promoted by a sale of their lands, the master must report his own opinion formed from facts, not that of others, nor an opinion founded upon that of others, without facts. Mere opinion of witnesses is no evidence: *In re sale of Infant's Lands*, 6 C. E. Green.

The testimony of the father and mother, owning a life estate in the premises, that the interest of the infants would be promoted by a sale, when they would be clearly benefited by the sale at the expense of the infants, should not be acted on and hardly received.: *Id.*

It is not a sufficient reason for the sale of infants' reversionary estate in lands, that the property is so much out of repair that it would now cost more to put it in tenantable repair than the income would justify, when the property has been in the actual possession of the life tenants. If they have suffered it to go out of repair, they are bound to put it in as good repair as it was when they entered upon it: *Id.*

Upon an application for the sale of an infant's reversion in lands, the only question is, will the property bring as much now as it will at the death of the life tenant. If it will not, it is not for the interest of the infants to sell, if the life tenant is to receive a share of the proceeds, or of the income from them, according to the rules of this court: *Id.*

INSURANCE

Warranty—Capture.—By the terms of a marine policy of insurance, the insurers were liable only for an absolute or technical total loss. The policy contained the following warranty: "Warranted by the assured free from loss or claims on account of capture, seizure, detention, or destruction by, or arriving from, any belligerent nation, or from any seceding or revolted state or states of the Union, or from any guerilla party, or by or from any officer, civil or military, or other persons claiming to act in their name, or under their authority, or in their behalf." *Held*, 1. That the forcible taking possession of the vessel by the officers of the United States government, with the intent to appropriate it to the use of the government for a specific purpose, viz., the carrying of a cargo to Santiago, amounted to a capture; and that the warranty in the policy did not extend to such capture. 2. That the grammatical structure of the sentence containing the warranty precluded any such extension, and no reason was apparent why the construction of the clause should not be according to such structure: *Murray et al. v. The Receivers of the Harmony Fire and Marine Ins. Co.*, 58 Barb.

And the vessel having been lost while thus in the service of the

government, by stranding, and the insured having, without any previous abandonment, made a claim on the United States government for payment for the use of the vessel, by reason of her loss while in the possession of the government officers, which claim was allowed and paid to an amount nearly equal to the whole value of the vessel. *Held*, that these circumstances caused the capture to cease from operating as a total loss; and that the insurers being liable under the policy, only in case of a total loss, it was immaterial whether they had insured against capture or not: *Id.*

Abandonment—Total Loss.—*Held also*, that if the assured had desired to make the constructive total loss arising from the capture an actual total loss, so far as the insurance was concerned, they should have abandoned; in which case the insurers would have been entitled to the sum paid by the government, but that they not having done so, but choosing to hold on to their property in the vessel, and to accept the sum paid by the government, could not claim to recover of the insurers as for a total loss: *Id.*

If the assured, before abandonment, either recovers the subject insured, or receives an indemnity for its loss, he cannot, thereafter, elect to abandon: *Id.*

LIMITATIONS, STATUTE OF.

Plea to Bill for Account.—The Statute of Limitations is a good plea to a bill for an account of trust funds, where the trust is not direct or express but arises merely by implication: *McClane's Adm'r. v. Shepherd's Ex'r.*, 6 C. E. Green.

MARRIAGE.

Contract in jest.—A marriage ceremony, though actually and legally performed, where it was in jest and not intended to be a contract of marriage, and it was so understood at the time by both parties, and is so considered and treated by them, is not a contract of marriage. Intention is necessary as in every other contract: *McClurg v. Terry*, 6 C. E. Green.

The Court of Chancery has the power to declare a marriage void when performed in jest, and where it was not intended to be a contract of marriage: *Id.*

MORTGAGE. See Vendor and Purchaser.

Failure of Mortgagee to keep his Covenants—Independent Covenants.—The failure of a mortgagee to keep his covenant to procure certain releases is no defence to a suit for the foreclosure of the mortgage, where the mortgagor agreed to pay the money at a certain time absolutely, and not on condition that the releases had been procured: *Coursen v. Canfield and Others*, 6 C. E. Green.

It does not affect the question that the suit is brought by a *bonâ fide* purchaser of the mortgage for a valuable and full consideration, without notice of this covenant. He holds it subject to every equity and defence to which it was subject in the hands of the mortgagee: *Id.*

Courts of equity will not give to such independent covenants an effect different from their legal effect, or turn independent covenants into conditional, because it will give better protection to a party, or diminish litigation: *Id.*

RELEASE.

How pleaded in Equity.—A plea of release is not void because it is not stated in the plea or the answer in support of it that the release was obtained freely and without fraud, when the bill contains no allegation of fraud: *McClane's Adm'x. v. Shepherd's Ex'r.*, 6 C. E. Green.

Such issue cannot now be raised by special replication. The modern practice is to permit the complainant to amend his bill by inserting allegations which will raise the issue, and require the defendant to answer as to them: *Id.*

TRUST. See *Agent—Limitations.*

VENDOR AND PURCHASER.

Sale of Stocks—Caveat emptor.—When \$1000 of the money which a mortgage was given to secure consisted in shares of a mining company, accepted by the mortgagor on the representation of the mortgagee that he had paid that much for it, but without misrepresentation or fraud by the mortgagee, the \$1000 will not be deducted from the mortgage: *Renton v. Maryott and Others*, 6 C. E. Green.

The rule of *caveat emptor* applies as well to the sale of stocks as of chattels. The vendor can only be made liable for misrepresentation or fraud: *Id.*

WARRANTY. See *Deed.*

WILL.

Power of Sale.—Where the will contains no power or direction to sell, such power is not created by implication, because necessary or convenient to enable the executors to execute the directions of the will: *Seeger's Executors v. Seeger*, 6 C. E. Green.

When express directions are given to sell and no person named to make sale, the power of sale is held to be in the executors by implication, in cases where it is their duty to distribute or pay out the proceeds: *Id.*

NEW LAW BOOKS.

BAINBRIDGE.—A Treatise on the Law of Mines and Minerals. By WM. BAINBRIDGE, Esq. 1st Am. from 3d London ed., with notes by GEORGE M. DALLAS. Philadelphia: John Campbell. 1871.

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NIXON.—Forms of Proceedings under the Laws of New Jersey. By JOHN T. NIXON. 3d ed., by J. S. AITKIN. Trenton: Chas. Scott. Shp. \$4.

PARKER.—The Law School of Harvard College. By JOEL PARKER. Pamph., pp. 56. New York: Hurd & Houghton. 1871.

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WRIGHT.—Annual Report of the Commissioner of Railroads and Telegraphs of the State of Ohio, for the year 1870. Vol. I., containing the Laws relative to Railroads and Telegraphs, with notes of decisions. By GEORGE B. WRIGHT, Commissioner. 8vo., pp. 667. Columbus: Nevins & Myers, State Printers.